

§ 19.44

shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 19.44 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that the conditions in paragraphs (a)(1), (2) and (3) of this section apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services provide for all of the following:

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

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(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange timeframes for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms, and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best

interest of the program or project involved. The “cost-plus-a-percentage-of-cost” or “percentage of construction cost” methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by 49 CFR part 29, the implementation of E.O.’s 12549 and 12689, “Debarment and Suspension.”

(e) Recipients shall, on request, make available for the Federal awarding agency, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient’s procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently \$25,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a “brand name” product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

(f) Additional procurement procedures.

(1) Section 165 of the STAA of 1982, as amended; section 337 of the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987, 49 U.S.C. 1601, section 1048 of the Intermodal Surface Transportation Efficiency Act of 1991, and section 9129 of

the Aviation Safety and Capacity Expansion Act of 1990, 49 U.S.C. app. 2226, impose Buy America requirements on the procurement of foreign products and materials by all recipients of FHWA, FTA, and Federal Aviation Administration (FAA) funds. Procedures are contained in 49 CFR part 660, Buy America Requirements and part 661, Buy America Requirements—STAA of 1982. In addition, for FTA recipients, nonregulatory guidance is contained in FTA Circular 4220.1B, Third Party Contracting Guidelines, Chapter I, section 11. Non-regulatory guidance for FAA programs is contained in FAA Order 5100.38A and special conditions in grant awards.

(2) Section 511(a)(16) of the Airport and Airway Improvement Act of 1982, 49 U.S.C. app. 2210, requires FAA recipients and subrecipients to extend the use of qualifications-based (e.g., architectural and engineering services) contract selection procedures to certain other related areas and to award such contracts in the same manner as Federal contracts for architectural and engineering services are negotiated under Title IX of the 1949 Federal Property and Administrative Services Act, or equivalent airport sponsor qualifications based requirements. Non-regulatory guidance for FAA programs is contained in FAA Order 5100.38A and special conditions in grant awards.

(3) Section 3(a)(2)(C) of the Federal Transit Act, as amended, (49 U.S.C. app. 1602(a)(2)(C)) prohibits the use of grant or loan funds to support procurements utilizing exclusionary or discriminatory specifications. Nonregulatory guidance is contained in FTA Circular 4220.1B, Third Party Contracting Guidelines, Chapter I, section 15 and Attachment A.

(4) Section 1241(b)(1) of 46 U.S.C. and 46 CFR part 381, Cargo Preference—U.S. Flag Vessels impose cargo preference requirements on the shipment of foreign made goods for FTA recipients. Nonregulatory guidance is contained in FTA Circular 4220.1B, Third Party Contracting Guidelines, Chapter I, section 10.

§ 19.45 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the